United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 5, 2010

TO : J. Michael Lightner, Regional Director

Region 22

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: MONOC 506-2017-0800

Cases 22-CA-29008, 22-CA-29083, 506-2017-4000 22-CA-29084, and 22-CA-29234 512-5006-1767 512 5024 3700

512-5024-3700 512-5036-8306 512-5072-8600 524-3350-8400 524-3350-9200 524-8387-2000 530-6050-3395

530-6067-4055-7700 530-6067-4055-8500

The Region submitted these cases for advice as to whether the Employer: (1) violated Section 8(a)(1) and (3) by disciplining employees based on their Facebook postings and reporting those postings to state agencies; (2) violated Section 8(a)(1) by engaging in unlawful surveillance or creating the impression of surveillance through its review of Facebook pages and emails provided to it by other employees; (3) violated Section 8(a)(5) by unilaterally implementing an in-house anger management counseling program; and (4) violated Section 8(a)(1) by informing employees that it was providing their personal contact information to the NLRB.

We conclude that the Employer did not violate the Act by disciplining employees and reporting them to state regulatory agencies based upon postings that did not involve protected concerted activity or union activity. Moreover, the Employer did not engage in surveillance or unlawfully create the impression of surveillance because it made employees aware that their fellow employees had provided the Facebook postings and emails to the Employer. In addition, the Employer did not violate Section 8(a)(1) by informing employees that it was releasing their personal contact information because the Employer indicated it was complying with a Board request for the information. However, the Region should issue a Section 8(a)(1) and (5) complaint, absent settlement, based upon the Employer's unilateral implementation of an in-house anger management counseling program.

FACTS

The Monmouth Ocean Hospital Service Corporation (MONOC or the Employer) is a non-profit company comprised of 15 New Jersey acute-care hospitals. MONOC also operates emergency medical services, including paramedic services, helicopter inter-facility and 911 services, mobile critical care services, basic life support inter-facility and 911 services, and an emergency medical services education department. On June 25, 2007, the Professional Emergency Medical Services Association of New Jersey (Union) was certified to represent a unit of MONOC's emergency medical services employees. The parties have been negotiating for their first contract but have not yet reached an agreement.

Since December 2007, the Union and the Employer have filed numerous unfair labor practice charges; they withdrew many of these charges after entering into two non-Board settlements. The Union has also filed complaints with other federal and state agencies and three employees, including the Union Secretary, have filed a state court lawsuit against MONOC alleging violation of state employment laws. As a result of these actions, OSHA issued a citation against the Employer and proposed a \$9,000 penalty. An investigation by the New Jersey Department of Health, Office of Emergency Medical Services (OEMS) is pending.

The Employer's Response to Employee Facebook Postings

Acting Union President Deborah Ehling maintains a profile on the social networking website known as Facebook. She uses her Facebook page to communicate information regarding bargaining and other Union activities and to criticize management policies. Only her authorized "friends" can access her postings. These include Chris Dalton, a Union member, and Ken Baker, a Union delegate who represented another employee in the appeal of his termination. Ehling works for MONOC as a registered nurse and paramedic; Dalton is a paramedic; and Baker is an EMT.

An unidentified employee or employees have provided copies of Ehling's Facebook profile pages to management periodically. In June 2009, 1 MONOC Regional Director Andy Caruso was handed printouts of her Facebook page; he passed them on to the Executive Director of Administration, Stacy Quagliana. Senior Vice President and COO Jeff Behm received them from another manager at about the same time.

¹ All dates are in 2009 unless otherwise noted.

Quagliana became concerned about postings that indicated that Ehling, Baker, and Dalton might withhold care if they were personally offended by the patients. She was concerned in particular about the following four postings:

• Ehling's June 7 posting:

[FOIA Exemptions 6 and 7(C)

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• Baker's response:

[FOIA Exemptions 6 and 7(C)

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• Ehling's June 11 posting:

[FOIA Exemptions 6 and 7(C)

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• Dalton's response:

[FOIA Exemptions 6 and 7(C)

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Caruso was concerned about a statement that Ehling [FOIA Exemptions 6 and 7(C)

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Shortly after receiving these Facebook printouts, MONOC upper management and attorneys met and agreed to suspend Ehling, Baker, and Dalton with pay, pending a psychological exam to determine if they were fit for duty. The employees were notified of this decision on June 16. Ehling specifically asked a manager how the Employer had obtained the postings, and he told her that a concerned employee had brought them to MONOC's attention. Quagliana sent letters to Ehling, Baker, and Dalton on June 18

formally advising them of their suspensions due to "disparaging written comments made by you regarding patients and patient care that were brought to our attention."

Meanwhile, on June 17, Employer General Counsel Margaret Keavney sent letters to the state Board of Nursing and OEMS, along with all the Facebook printouts. She noted that the Employer was investigating the comments that showed "a disregard for patient safety and an attitude at odds with the compassion one usually associates with the nursing profession." She called attention in particular to Ehling's June 11 posting regarding the Holocaust Museum shooting. In her letter to the OEMS, Keavney stated that only OEMS could determine if the statements were actionable and therefore she was notifying OEMS notwithstanding that her own evaluation of the statements was still ongoing. her letter to the Board of Nursing, Keavney requested "expert advice" as to any action the Board believed MONOC should take with regard to Ehling. Employer Policy 923 provides that "credible evidence" of a violation of criminal, civil, or administrative law will be "timely disclose[d] ... to the appropriate law enforcement or regulatory agency" if deemed necessary after consultation with counsel.

Within two weeks of the suspensions, the psychologist found Ehling, Baker, and Dalton fit for duty. The Employer had also reviewed the charts of patients whom Ehling and Dalton had intubated in the past six months and found no problems. (Baker does not perform the intubation procedure.) On July 20, all three received memos to the file stating that they had violated MONOC Employee Behavior Policy 109, which states that: "Any conduct that adversely affects the operations of MONOC or MONOC's reputation, or is determined to be offensive to MONOC's employees, management, members, professional colleagues, or the general public, will not be tolerated." Although no discipline was imposed, they were notified that future similar incidents or violations of this policy would lead to progressive disciplinary procedure.

The Employer submitted the following evidence regarding discipline for comparable employee misconduct. On July 3, an EMT posted a banner at her post that read: "Be Nice to Me or I May Circle the Block a Few More Times." The following day, she left a poster in an ambulance that stated, "Just Because It's Your Emergency Doesn't Mean It's Mine." She was suspended with pay pending a psychological exam; when she was cleared to return to duty, the Employer issued her ten disciplinary points but stayed her termination because she had no prior discipline and was honest during the investigation. She received harsher

discipline than Ehling, Baker, and Dalton because her banners were found at the workplace. On the other hand, the Employer did not discipline an employee who posted comments on MySpace (another social networking website) in 2006 that criticized the Employer for failing to give raises and supported the Union campaign because her postings did not interfere with her patient care responsibilities.

On September 14, OEMS notified the Employer that the Facebook postings did not provide sufficient evidence that the certified individuals involved were violating OEMS rules or failing to meet standards of patient care.

The Employer's Reaction to Ehling's E-mails

Ehling often sent e-mails regarding workplace issues to Union members registered on the Union website. On June 15, MONOC's labor attorney, John Vreeland, e-mailed the Union's attorney, Ray Heineman, asking to discuss two attached e-mails from Ehling to Union members regarding vehicle safety issues and disciplinary memos. In follow-up conversations on June 15 and June 16, Vreeland told Heineman that: employees had been forwarding Ehling's e-mails to managers; those e-mails were accusatory and insulting and suggested that employees should not follow MONOC policy; and this was angering management and adversely affecting contract negotiations.

On August 24, the Employer's labor attorney again wrote to Union counsel, attaching various Ehling e-mails to Union members, including one that stated "Remember, if MONOC management lips are moving, they are lying." In his e-mail and a subsequent phone conversation on August 25, Vreeland suggested that Ehling sent these e-mails just prior to scheduled bargaining sessions in order to sabotage those sessions. A similar exchange occurred prior to a bargaining session held October 13, regarding e-mails Ehling sent October 12.²

² There were two other incidents involving the Employer's observation of employee internet communications. In late spring, Caruso saw a picture of Flight Team employee David Aromin in his MONOC flight suit on a website entitled "Down with Jersey Volunteers." He forwarded the screen shots to Chief Flight Paramedic Steve Olson, stating that he thought it inappropriate for employees to post photos of themselves in uniform on a website "bashing" volunteers. Olson asked Aromin to remove the picture, and he complied. Then, on June 17, Olson and another manager confronted Aromin's flight team partner, Michael Krot, and requested that he show them his Facebook page to insure that he had not posted any pictures of himself in uniform. Krot reluctantly

The Employer's Anger Management Counseling Program

In September 2008, managers Caruso, Quagliana, and Robert McClintock had received training and were certified as anger management resolution therapists. In July, MONOC informed the Union during negotiations that it was now providing anger management counseling internally. At about the same time, the Employer required an employee to attend in-house anger management counseling after a second incident of road rage. The Employer claims that it previously used a law firm to provide anger management counseling; the Union disputes that such a program ever existed.

In August, Ehling complained to Behm about the unilateral implementation of an internal anger management counseling program. In particular, the Union believes that the use of managers as counselors is intimidating and could lead to harassment of Union members. Behm responded that the Employer was trying to save money and the use of a trained therapist would not lead to intimidation or harassment. In the fall, Caruso and Quagliana conducted a one-hour course for a unit employee who had received two disciplinary points for using profanity while driving an ambulance.

The Employer's Release of Private Information

On October 2, the Region requested evidence from the Employer in response to several pending charges, including contact information for "educators" employed in the past two years. By letters dated November 9, Quagliana informed the Education Department employees that the NLRB had requested their names, addresses, and phone numbers and the Employer's attorneys had advised that it should comply and release the information. The Employer has an established policy of informing employees that it is releasing personal information anytime that an agency or the Union requests such information. The Union confirms that similar letters were sent in the past when it requested employee information.

ACTION

We conclude that the Region should issue a Section 8(a)(1) and (5) complaint, absent settlement, based upon the Employer's unilateral implementation of an in-house

showed his Facebook page, and the managers did not see any inappropriate photos.

anger management counseling program and dismiss the remaining allegations, absent withdrawal.

Discipline of Employees

The Board has held that an employer's discipline of an employee based on website statements relating to terms or conditions of employment and/or a labor dispute is unlawful.³ In <u>Valley Hospital Medical Center</u>, the Employer violated Section 8(a)(1) and (3) by suspending an employee for statements regarding patient staffing levels that disparaged the level of patient care because those statements related to terms and conditions of employment and a labor dispute and therefore were protected. 4 The Board determined that the statements at issue were not "so disloyal, reckless, or maliciously untrue" as to lose protection; they were intended to pressure the Employer to increase staffing rather than to harm the Employer.⁵ Similarly, in Endicott Interconnect Technologies, Inc., the Employer violated Section (8) (1) by discharging an employee who criticized the Employer's new owner in the press for layoffs that left "gaping holes" and stated on a public website that the company was "being tanked by a group of people that have no good ability to manage it."6 The Board found the "requisite nexus" between the statements and ongoing labor disputes and determined that the statements were "not so egregious" as to lose the Act's protection. 7

On the other hand, the Board has dismissed allegations of a discriminatory discharge based upon an employee's workplace internet activity that was not linked to working

³ See Valley Hospital Medical Center, 351 NLRB 1250, 1252-54 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 209 U.S. App. LEXIS 25204 (9th Cir. 2009) (discipline based on statements made on website and at press conference; discharge based on statements in flyer distributed to the public); Endicott Interconnect Technologies, Inc., 345 NLRB 448, 450-52 (2005), enf. denied 453 F.3d 532 (D.C. Cir. 2006) (discharge based on statements in newspaper article and on newspaper's publicforum website).

⁴ <u>Id.</u> at 1252.

⁵ Id. at 1252-53.

^{6 345} NLRB at 449.

 $^{^7}$ <u>Id.</u> at 450.

conditions.⁸ In Amcast Automotive, the employee had searched for information regarding the company purchasing the facility, and the Board held that Section 7 does not extend to employee activities regarding ownership of the employer absent evidence of a "direct impact" on terms and conditions of employment.⁹

Here, the Employer disciplined three employees for Facebook postings that suggested those employees might not provide appropriate care to the Employer's patients. While other postings on Ehling's Facebook page clearly involved protected communications regarding terms and conditions of employment and ongoing labor disputes, the specific comments cited by the Employer as the basis of the employees' suspensions did not involve Section 7 concerns and were in no way related to the postings that did. Moreover, there is no evidence that these employees were treated disparately based upon their union or protected concerted activity. An employee who made similar comments, but at the worksite, was disciplined more severely; an employee who posted comments on MySpace regarding union activity and terms and conditions of employment was not disciplined at all. We therefore conclude that Ehling, Baker, and Dalton were not disciplined for any protected activity and, consequently, their discipline did not violate the Act.

Reports to State Agencies

An employer may violate the Act by reporting employees to state regulatory agencies in retaliation for union or protected activity. There cannot be a violation, however, where an employer reports conduct that was not protected.

⁸ See Amcast Automotive of Indiana, Inc., 348 NLRB 836, 838-40 (2006).

⁹ <u>Id.</u> at 838.

Nursing Center at Vineland, 314 NLRB 947, 954-56 (1994), enfd. 79 F.3d 354 (3d Cir. 1996) (employer violated Section 8(a)(1), (3), and (4) by disparately and discriminatorily reporting patient abuse allegations to state agency); Read Memorial Hospital, 265 NLRB 789, 797 (1982) (employer violated Section 8(a)(1) and (4) by referring discharged nurse's file to state agency to consider license revocation, in retaliation for her unfair labor practice charge). See also Jorgensen's Inn, 227 NLRB 1500, 1503-04 (1977), enfd. mem. 588 F.2d 822 (3d Cir. 1978) (employer violated Section 8(a)(1) by threatening to report waitresses to IRS for underreporting tip income if union campaign succeeded).

Thus, in Nynex Corp., the Board held that the employer did not violate Section 8(a)(1) by summoning the police where union representatives caused a two-hour disruption of work and persistently refused demands to leave. 11

Here, the Employer's reports to the state regulatory agencies were based on the unprotected Facebook postings discussed above and therefore did not violate the Act. Although the Employer's reporting occurred in the context of its concerns about protected e-mails that it found offensive, there is no evidence establishing that the Employer's reporting was in retaliation for that activity. Instead, the evidence supports the Employer's assertion that it felt bound to report conduct that indicated an inappropriate attitude and possibly inappropriate conduct in the administration of patient care.

Monitoring of Employee Facebook Postings and E-mails

Employer surveillance or creation of an impression of surveillance constitutes unlawful interference with Section 7 rights because employees should feel free to participate in union activity "without the fear that members of management are peering over their shoulders[.]"12 An employer creates an impression of surveillance when "the employee would reasonably assume from the [employer's] statement that their [sic] union activities had been placed under surveillance."13 In general, the Board finds that test met when an employer reveals specific information about a union activity that is not generally known, and does not reveal its source. 14 In such circumstances,

¹¹ 338 NLRB 659, 660-61 (2002).

¹² See Flexsteel Industries, 311 NLRB 257, 257 (1993).

^{13 &}lt;u>Ibid.</u> (violation found where personnel manager informed an employee on two occasions that he had heard a rumor that the employee instigated the union campaign and was passing out authorization cards).

¹⁴ See, e.g., Stevens Creek Chrysler Jeep Dodge, 353 NLRB No. 132, slip op. at 3 (2009) (manager told employees that he "already knew" about the union meeting and distribution of cards and did not reveal that he had learned the information from another employee); Sam's Club, 342 NLRB 620, 620-21 (2004) (store manager told employer he had heard the employee was circulating a petition about wages without revealing how he came by the information); Avondale Industries, 329 NLRB 1064, 1265 (1999) (supervisor told employee that he knew employee was union supporter and, when asked how he got his information, responded that he "couldn't say").

employees reasonably conclude that the information was obtained through employer monitoring. 15

On the other hand, no impression of surveillance is created where the employer explains that it obtained the information from other employees, particularly in the absence of evidence that the employer solicited the information. For example, in <u>Bridgestone Firestone South Carolina</u>, a manager's plant-wide letter thanking "the many team members who have chosen to provide information to me" regarding an organizing campaign did not create an unlawful impression of surveillance because it merely reported information that employees had provided voluntarily. 17

Here, the Employer did not actually engage in surveillance; instead it obtained Ehling's Facebook pages and e-mails from other employees without soliciting them. Moreover, the Employer made that clear to the three involved employees. When Ehling asked how the Employer obtained her postings, she was told that a concerned employee had produced them. Moreover, since Ehling had restricted access to her "friends," she would not reasonably conclude that the Employer was directly monitoring her Facebook page. Similarly, Quagliana's letters to Ehling, Baker, and Dalton formally advising them of their suspensions reference comments "brought to" the Employer's attention. Likewise, the Employer's labor attorney told the Union's attorney that employees had been forwarding Ehling's e-mails to managers. In these circumstances, the employees could not reasonably believe that the Employer itself was monitoring these communications. 18 Accordingly, the Employer did not unlawfully create an impression of surveillance.

 $^{^{15}}$ See, e.g., Stevens Creek Chrysler Jeep Dodge, 353 NLRB No. 132, slip op. at 3 (employer's failure to identify employee source of information was "the 'gravamen'" of an impression of surveillance violation).

¹⁶ See, e.g., North Hills Office Services, 346 NLRB 1099, 1103-04 (2006) (supervisor told employee that two of her coworkers had reported on her distribution of union literature during working hours); Park 'N Fly, Inc., 349 NLRB 132, 133 (2007) (supervisor told employee that another named employee had reported that the employee spoke with a "union guy").

¹⁷ Bridgestone Firestone South Carolina, 350 NLRB 526, 526-27 (2007).

¹⁸ The Employer's investigation of flight team employees' Facebook pictures also did not create the impression of

Changes in the Anger Management Counseling Program

The Board has long held that an employer's disciplinary system and work rules that involve the imposition of discipline constitute mandatory subjects of bargaining. Thus, any unilateral changes that materially affect such terms and conditions of employment violate Section 8(a)(1) and (5). 20

The Employer's anger management counseling program was part of its disciplinary system and, presumably, could lead to further discipline if an employee refused to submit to required counseling. Therefore, any material change in the program was subject to bargaining. While there is a dispute as to whether the Employer had a pre-existing anger management counseling program, the Employer admitted that in July, for the first time, it required a disciplined employee to undergo counseling by its own managers. Since this requirement was a material change in the disciplinary system, the Employer violated Section 8(a)(1) and (5) by failing to provide the Union notice or an opportunity to bargain.

Letter Regarding Release of Private Information

An employer makes an unlawful coercive statement if "under all the circumstances[,]" the statement "reasonably tends to restrain, coerce or interfere" with Section 7 rights. 21 In this case, the Employer truthfully informed

surveillance. Caruso came across Aromin's pictures on a presumably public website of a group named "Down with Jersey Volunteers"; and the Employer only viewed Krot's pictures with his cooperation.

¹⁹ See Toledo Blade Co., 343 NLRB 385, 387 (2004), and cases cited therein; Union-Tribune Publishing Co., 353 NLRB No. 2, slip op. at 1, fn.2 (2008) (unlawful unilateral change requiring employees who suffered possible hearing injuries to undergo drug and alcohol testing); Good Hope Refineries, 245 NLRB 380, fn.3 (1979), enfd. 620 F.2d 57 (5th Cir. 1980), cert. denied 449 U.S. 1012 (1980) (unlawful change disallowing employees representation during absence counseling).

Toledo Blade Co., 343 NLRB at 387 (employer violated Section 8(a)(5) by unilaterally changing work rule regarding work errors and discipline for such errors).

 $^{^{21}}$ Interstate Truck Parts, Inc., 312 NLRB 660, 662 (1993), enfd. mem. 52 F.3d 316 (3d Cir. 1995), quoting O.K. Trucking Co., 298 NLRB 804, fn. 2 (1990).

employees that the NLRB had requested their contact information and that, pursuant to advice of counsel, the Employer was going to provide it. The Employer has sent similar letters in advance of responding to Union information requests. No employee would reasonably conclude that he or she would be subject to Employer coercion or reprisals on the basis of the Employer's announcement that it was complying with an information request from the Board.

Accordingly, the Region should dismiss, absent withdrawal, the charges in Case 22-CA-29008, 22-CA-29084, and 22-CA-29234, alleging unlawful discipline of Ehling, Baker, and Dalton, retaliatory reports to the New Jersey Board of Nursing and OEMS, unlawful surveillance, and intimidation and coercion. However, the Region should issue complaint in Case 22-CA-29083, absent settlement, based upon the Employer's unilateral implementation of an in-house anger management counseling program.